



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.", is written over the printed name.

OF CRIMINAL APPEALS

MALCOLM H. SQUIRES, JR.
Clerk of Court

UNITED STATES, Appellee
v.
Private First Class MICHAEL D. ROBERTS, JR.
United States Army, Appellant

ARMY 20130826

Headquarters, United States Army Special Forces Command (Airborne)
Deidra J. Fleming, Military Judge
Lieutenant Colonel Russell N. Parson, Staff Judge Advocate

For Appellant: Lieutenant Colonel Jonathan Potter, JA; Major M. Patrick Gordon, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major A.G. Courie III, JA; Captain Benjamin W. Hogan, JA (on brief).

27 April 2015

SUMMARY DISPOSITION

PENLAND, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of attempted housebreaking, one specification of absence without leave terminated by apprehension, six specifications of violating a lawful general regulation, and one specification of willful disobedience of a noncommissioned officer in violation of Articles 80, 86, 91, and 92 of the Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 880, 886, 891, 892 (2012). The military judge sentenced appellant to a bad-conduct discharge, ten months confinement, and reduction to the grade of E-1. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge, six months confinement, and reduction to the grade of E-1 and credited appellant with 174 days against the sentence to confinement.

We review appellant's case pursuant to Article 66, UCMJ. Appellant raises one assignment of error, which merits neither discussion nor relief. However, upon

our review of the record, we hold there is a substantial basis in law and fact to question appellant's plea to a portion of Specification 6 of Charge IV.

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A guilty plea will only be set aside if we find a substantial basis in law or fact to question the plea. *Id.* (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The court applies this "substantial basis" test by determining whether the record raises a substantial question about the factual basis of appellant's guilty plea or the law underpinning the plea. *Id.*; see also UCMJ art. 45(a); Rule for Courts-Martial 910(e).

Specification 6 of Charge IV alleged a violation of Article 92, UCMJ:

In that [appellant], did, at or near Prescott Valley, Arizona, on divers occasions, between on or about 29 January 2013 and on or about 28 February 2013, violate a lawful general regulation, to wit: DoD FMR 7000.14-R, Volume 9, Chapter 3, Paragraph 031003, dated August 2011, by wrongfully using his Government Travel Card for personal expenses and ATM withdrawals while not being on official travel orders.

During the providence inquiry, the military judge asked appellant to describe in his own words why he was guilty of this specification, and appellant answered that he used the Government Travel Card (GTC) in Prescott Valley to pay for lodging, food and fuel expenses. Appellant did not mention using the GTC to make ATM withdrawals in Prescott Valley; the stipulation of fact did not describe any ATM withdrawals in Prescott Valley; and the GTC billing statement admitted at trial did not indicate any ATM withdrawals in Prescott Valley.

We acknowledge appellant answered, "[y]es, Your Honor," when at the end of the providence inquiry, the military judge asked: "Do you believe and admit that, on divers occasions, between on or about 29 January 2013 and on or about 28 February 2013, you wrongfully used your government travel card, for personal expenses and ATM withdrawals, at or near Prescott Valley, Arizona?" However, "[i]t is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002). Appellant's response to the judge's leading question does not meet the mandate of *Care* that the accused himself must reveal the factual circumstances that support his plea. See *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980); *United States v. Care*, 18 U.S.C.M.A. 535, 541-42, 40 C.M.R. 247, 253-54 (1969). In this case, the remainder of appellant's colloquy with the judge, the stipulation of fact, and the GTC billing statements were silent as to any ATM withdrawals with the GTC at

Prescott Valley. We, therefore, find a substantial basis in law and fact to question appellant's plea to this portion of the affected specification.

CONCLUSION

We affirm only so much of the finding of guilty of Specification 6 of Charge IV as provides:

In that Private First Class Michael D. Roberts, Jr., U.S. Army, did, at or near Prescott Valley, Arizona, on divers occasions, between on or about 29 January 2013 and on or about 28 February 2013, violate a lawful general regulation, to wit: DoD FMR 7000.14-R, Volume 9, Chapter 3, Paragraph 031003, dated August 2011, by wrongfully using his Government Travel Card for personal expenses while not being on official travel orders.

The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we are confident the military judge would have adjudged the same sentence absent the error. The approved sentence is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision are ordered restored.

Senior Judge LIND and Judge KRAUSS concur.



FOR THE COURT:

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